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TRANSATLANTIC COOPERATION IN CRIMINAL LAW

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Overview

Transatlantic cooperation in Justice and Home Affairs received its most prominent rule-making impetus after the September 2001 (9/11) terrorist attacks, when a raft of EU-US Justice and Home Affairs Agreements were enacted.[1] Rule-making from this particular period may be considered to demonstrate the limitations of mutual recognition of each other's legal order or the shortcomings of adequacy presumptions in law.[2] Nonetheless, over a decade after 9/11, transatlantic cooperation in criminal law continues to have a lively agenda, even if the impetus for terrorism legislation in the transatlantic context has abated. EU-US Agreements in Justice and Home Affairs have inspired the EU to engage in 'replica' rule-making of policies, programmes and Agreements.[3] For example, there have been various EU Security policies pursued which have clear imprints of EU-US policies. The EU has developed an EU Passenger Name Records Directive and an EU Terrorist Finance Tracking System, mirroring in form, context and lexicon the EU-US Passenger Name Records (EU-US PNR) Agreements and EU-US Terrorist Financial Tracking Programme (EU-US TFTP) Agreements.[4] EU internal security rule-making grapples increasingly with the relationship between its external and internal dimensions.[5] The EU's rule-making with the US receives special mention in such internal

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[1] Elaine Fahey, 'Law and Governance as checks and balances in Transatlantic Security' (2013) YEL 32 1. See also on transatlantic rule-making Valsamis Mitsilegas, 'Transatlantic Counter-terrorism Cooperation and European Values: the Elusive Quest for Coherence' and Juan Santos Vara, 'Transatlantic Counter-terrorism Agreements on the transfer of personal data: a test for democratic accountability in the EU' in Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders* (Cambridge University Press 2014) Chs. 14 & 15 therein. See Valsamis Mitsilegas, 'EU-US Co-operation in Criminal Matters post-9/11: Extradition, Mutual Legal Assistance and the Exchange of Police Data' (2003) 8 E.F.A.Rev. 515; Valsamis Mitsilegas 'The External Dimension of EU Action in Criminal Matters' (2007) 12 E.F.A.Rev. 471; Kristin Archick, 'EU-US Cooperation Against Terrorism' (2012) Congressional Research Service 7-5700; Marise Cremona, 'Justice and Home Affairs in a Globalised World: Ambitions and Reality in the tale of the EU-US SWIFT Agreement' (2011) Working Paper No. 4 Institute for European integration Research Marieke de Goede, 'The SWIFT affair and the Global Politics of European Security' (2012) 50 J.Com.Mar.St 214; Elaine Fahey, 'On the Use of Law in Transatlantic Relations: Legal Dialogues between the EU and US' ELJ (forthcoming); Patryk Pawlak, (ed), *The EU-US security and justice agenda in action* (EUISS Chaillot Paper 2012); Theodore Georgopoulos 'What kind of Treaty-Making Power for the EU? Constitutional problems related to the conclusion of the EU-US Agreements on Extradition and Mutual legal Assistance' (2005) 30 E.L.Rev. 191; William Gilmore,'The External Dimension of EU Action in Criminal Matters' in Maria Fletcher, Robin Loof and William Gilmore (eds), *EU Criminal Law and Justice* 150.

[2] See Mitsilegas; Santos Vara, (n 1) .

[3] For example, Proposal For a Directive on the use of Passenger Name Record data for the prevention, detection investigation and prosecution of terrorist offences and serious crime COM(2011)32, Commission Communication, A European terrorist finance tracking system available options COM(2011)429 final. See Elaine Fahey, 'Legal Issues of Transatlantic Rule-Transfer onto EU Internal Security Law: The Development of an EU Passenger Name Records and EU Terrorist Financial Tracking System' (forthcoming) EJIS.

[4] See Section 1, next.

[5] See Elaine Fahey, 'The EU'S Cybercrime and Cyber Security Rule-Making: Mapping the Internal and External Dimensions of EU Security' (forthcoming) EJRR; Florian Trauner and Helena Carrapico, 'The external dimension of EU justice and home affairs after the Lisbon Treaty: analysing the dynamics of expansion and diversification'

rule-making processes, for example, in cybercrime and cyber security.[6] The recent NSA surveillance saga has placed EU-US Justice and Home Affairs cooperation centre stage once more.[7] More specifically, the outbreak of the NSA surveillance saga in the midst of the rule-making processes has operated to place EU citizens fundamental rights and data protection centrally in *all* rule-making of the EU with the US, from trade to security. It caused the European Parliament to vote to suspend all EU-US data transfer agreements.[8] By contrast, the EU-US Justice and Home Affairs Ministerial meeting in late 2013 stressed the importance of developing the EU-US negotiations on a data protection agreement, referencing the work of the EU-US ad hoc working group on the NSA surveillance saga.[9]

Current EU-US cooperation in counterterrorism and security includes diverse and particular areas such as *inter alia* EU-US Cybercrime and Security, Counter Violent Extremism ('CVE') cooperation, foreign fighter's cooperation and explosives security.[10] Future areas of EU-US criminal law cooperation envisaged includes *inter alia* victims' rights and hate crimes. They explicitly take cognisance of EU legislative developments, as well as the process of reform of EU agencies underfoot (e.g. as to Europol, Eurojust etc).[11] This demonstrates the vibrancy of the cooperation and its evolving character, as well as the challenging relationship between the 'external' and 'internal' for the EU.

The chapter purports to offer a 'birds-eye' view of key contemporary instruments and mechanisms in the area of Transatlantic Cooperation in Criminal Law. It begins with a brief overview of understanding contemporary Transatlantic Cooperation through Law (*Section 1*) and then moves to outline key agreements between the EU and US in Extradition and Mutual Legal Assistance, including Death penalty cooperation (*Section 2*). Thereafter, there is a brief consideration of Agreements between Europol and the US (*Section 3*), and then the chapter reflects upon the latest area of transatlantic cooperation in Criminal law, namely EU Cybercrime and Cyber Security (*Section 4*), followed by concluding reflections. On grounds of space and definitional exclusion of predominantly civil law mechanisms, agreements between the EU and US to transfer data for purposes pursuant to security cooperation are not considered here.[12]

(2012) 17 E.F.A.Rev. 5; Florian Trauner, 'The internal-external security nexus: more coherence under Lisbon?' (EUISS Occasional Paper No 89, March 2011) <http://www.iss.europa.eu/uploads/media/op89_The_internal-external_security_nexus.pdf.> accessed…

[6] See section 4.

[7] See 'EU-US Counterterrorism pacts at risk over snooping affair' *EUObserver.com* (5 July 2013); 'MEPs raise suspension of EU-US bank data deal' *LIBE Press* release (24 September 2013) <http://www.europarl.europa.eu/news/en/news-room/content/20130923IPR20604/html/MEPs-raise-suspension-of-EU-US-bank-data-deal> accessed 31 March 2014.

[8] European Parliament resolution of 23 October 2013 on the suspension of the TFTP agreement as a result of US National Security Agency surveillance (2013/2831(RSP))

[9] EU-US Justice and Home Affairs Ministerial Meeting of 18 November 2013, Council 16418/13, 18 November, 2013; 'Report on the Findings by the EU Co-chairs of the Ad Hoc EU-US Working Group on Data Protection', Council doc 16987/13, 27 November, 2013 ; 'Rebuilding Trust in EU-US Data Flows' COM(2013) 846 final.

[10] Summary of Conclusions of the EU-US JHA Ministerial Meeting (18 November 2013) Council doc. 16682/13. See also the European External Action Service overview of transatlantic cooperation in justice and home affairs: <http://eeas.europa.eu/us/sector_en.htm> accessed 31 March 2014.

[11] Ministerial JHA meeting (n 9)

[12] Although the definitional line is difficult to maintain. It is covered extensively elsewhere: see (n 1) .Also not considered but noteworthy are the many civil and administrative proceedings taken or pending by the Dutch

1. Transatlantic cooperation through law

The recent negotiations between the EU and US on a Transatlantic Trade and Investment Partnership (TTIP) may signify a new era of legal cooperation between the EU and US in trade, if successful because of their plan for the institutionalisation of transatlantic *trade* relations.[13] The institutionalisation of EU-US *security* cooperation has also been recently mooted as a next step forward in transatlantic cooperation.[14] Nevertheless, the relationship between the EU and US is conventionally viewed as a 'law-light' and 'institutionally-light' scientific entity.[15] Relations between the EU and US have been guided by documents such as the Transatlantic Declaration and the New Transatlantic Agenda, which are not legally binding.[16] Historically, most rule-making between the EU and US has taken place in permanent networks of dialogues- but notably *not* in justice.[17] They have variable degrees of success or failure and comprise public and private spheres, variable actors and activities.[18] In this regard, the democratic credentials of transatlantic rule-making are not per se rated highly. For example, these dialogues are perceived to have given certain economic actors privileged access to policy makers at the expense of other sectors of transatlantic society.[19] However, as the TTIP negotiations signify, rule-making networks between the EU and US, such as the formal and permanent dialogues between the EU and US, along with High Level Working Groups, are subject to increasing standards and expectations of participation and transparency.

Rule-making in Justice and Home Affairs in the post 9/11 period has similarly been subject to broad critique for the secrecy surrounding its negotiation and the scant attention to questions of fundamental rights in much of the rule-making.[20] Two of the most prominent Agreements entered into by the EU with US in the post 9/11 period, designed to communicate air passenger data and to target the financing of terrorism are the EU-US Passenger Name Records (EU-US PNR) Agreements and EU-US Terrorist Financial Tracking Programme (EU-US TFTP) Agreements.[21] These Agreements,

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MEP Sophie in' t veld in respect of EU-US Agreements on data transfer for security/ counter-terrorism purposes: See *In't veld v. Department of Homeland Security* (2008 No. 1151, US District of Columbia District Judge Collyer) (15 December 2008); See T-529/09 *In't Veld v. Council*, Judgment of the General Court of 4 May 2012 [2012] ECR II-000 (under appeal: Case C-350/12, Opinion of Advocate General Sharpston of 12 February 2014). They possibly indicate the increasingly justiciable character of transatlantic security

[13] See Marija Bartl and Elaine Fahey, 'A Postnational Marketplace? On the Negotiation of the Transatlantic Trade and Investment Partnership (TTIP)' in Fahey and Curtin, (n 1)

[14] See discussion of Handbook in Section 2.

[15] Mark Pollack, 'The New Transatlantic Agenda at Ten: Reflections in an experiment in International Governance' (2005) 43 J.Com.Mar.St., 899. Cf Fahey, 'On the use of Law in Transatlantic Relations: Legal Dialogues Between the EU and US' (n 1)

[16] The New Transatlantic Agenda (NTA), ssigned 3 December, 1995 in Madrid.

[17] Eg, the Transatlantic Business Dialogue, Transatlantic Labour Dialogue, Transatlantic Consumer Dialogue and Transatlantic Environment Dialogue

[18] See Maria Green Cowles, 'The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue' in Mark Pollack and Gregory Shaffer (eds), *Transatlantic Governance in the Global Economy* (Lanham MD: Rowman & Littlefield 2001) 215

[19] Ibid

[20] See Mitsilegas n 1.

[21] See Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Record Data to the United States Department of Homeland Security of 17 November 2011; COM (2011) 807 final, approved by the European Parliament in April 2012 (hereafter EU-US PNR); Agreement between the European Union and the United States of America on the processing and Transfer of Financial

even in later evolutions, have generated much controversy on account of their limitations on redress and their uneven application of US law to EU citizens, not enabling the latter to fully realise their rights to redress and review. The formulation of the character of rights, remedies and redress is distinctively replicated in both agreements in a broad time frame, extending well after a decade post 9/11.[22] As a result, they are perceived to form very prominent examples of the limits of mutual recognition of justice in transatlantic relations.[23] Moreover, the use of detailed governance or review mechanisms to monitor the operation of these agreements has generated little by way of substantive change.[24] It forms a complexity that is nonetheless essential to understanding the nature of and limits of transatlantic cooperation. However, as is explored later below, there are new fields of cooperation ongoing and even mooted institutionalisation of security that tends to suggest a new era of law in transatlantic relations.

This chapter considers next the key features of transatlantic cooperation mechanisms in criminal law in two prominent subject areas of cooperation, Extradition and Mutual Legal Assistance.

2. The EU-US Extradition and Mutual Legal Assistance Agreements

Overview

In June 2003, the EU and US signed two treaties on extradition and mutual legal assistance so as to simplify the extradition process and promote better prosecutorial cooperation, as part of efforts to improve transatlantic security cooperation post 9/11.[25] The Agreements were historic as they were the first law enforcement agreements conducted between the EU and US and the first cooperation agreements to be negotiated by the Council in criminal matters pursuant to ex Articles 24 and 38 Treaty of the European Union (TEU).[26] The negotiation of bilateral instruments with 15 EU Member States followed thereafter as well as the negotiation with 10 new accession States in 2004. After the 2007, two full extradition treaties and two bilateral mutual assistance instruments were concluded with Bulgaria and Romania in 2007. An exchange of instruments between the EU and US took place in 2009 and all instruments and the Agreements entered into force on 1 February 2010, prompting many to note the time lag between the beginning of the rule-making process and its output, albeit that it appears readily explicable on the basis of the Enlargement process which took effect just at

Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (hereafter TFTP), OJ L 195

[22] On reciprocity and its limits see Gregory Shaffer, 'Reconciling Trade and Regulatory Roles: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements' (2002) 9 *Colum.J.Eur.L.* 29; Valsamis Mitsilegas, 'Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 CML Rev. 1277

[23] Fahey, 'Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU-US Passenger Name Records and the Terrorist Finance Tracking Program' (n 1)

[24] Ibid

[25] See Council Decision 2009/820/CFSP of 23 October 2009 on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America, [2003] OJ 181/25. On the concluded treaties, see [2009] OJ L 291/40 and the Extradition Treaty to the Dutch Antilles: [2009] OJ L 325/4

[26] See Mitsilegas 2003; Mitsilegas 2009; Georgopolous in n 1. See also Steve Peers, *Justice and Home Affairs Law* (OUP 2011) 751 .

the time that the US Senate was ready to consider the Agreements and all bilateral instruments with the Member States.[27]

Their negotiation surpassed the debate on whether the EU had legal personality at this time to so act. As a result, many suggested that appeared as a step towards the EU being a global player in the area of criminal law or at least a precedent of the EU speaking with one voice in criminal matters, globally.[28] The secrecy of the negotiation of the agreements and their limited review by parliaments in both jurisdictions gave rise to concerns about the democratic character of the agreements.[29] Similarly, the omission of human rights protections from the scope of the agreements provoked concerns, as did the prospect of joint investigation teams working together as well as the place of personal data within the scope of the agreements.[30] These concerns are ones which are common to all post 9/11 rule-making in this field.

A frequent question arises as to the added value of EU-US Agreements beyond what were previously existing bilaterally between the US and individual Member States. The EU-US Agreements in Article 3(2) refer to the US and each Member State entering into a written instrument to acknowledge their effect on existing bilateral extradition treaties and/ or MLATs. Most Member States have chosen the term 'instrument', but not all.[31] There are also some variations in the form of the bilateral instruments across the Member States. A majority of Member States opted for an instrument containing an annex clearly stating the changes made by the EU-US Agreements, but there are considerable variations in a minority of States. The EU remains responsible for the implementation of each Agreement.[32] The Member States are bound to the provisions of each EU-US Agreement as a matter of law and also have separate but parallel international obligations with the US under the bilateral instruments.[33] It was asserted to possibly give rise to considerable implementation issues, some comparing it to the implementation to that of the European arrest warrant, which has been frequently been subject to challenges in the Member States,[34] although practice suggests that this viewpoint has not come to fruition.

At the time of writing, there were 54 agreements in place between the EU and US on extradition and mutual legal assistance.[35] This cooperation remains furthered by cooperation amongst practitioners through the auspices of Eurojust, cooperation which won significant joint praise for its effectiveness

[27] The US had extradition treaties with all EU Member States and Mutual Legal Assistance Agreements with 20 of 27 by 2011, demonstrating the swiftness of the rule-making.

[28] Mitsilegas 2003 (n 1) 533, referring to Nanette Neuwahl, 'A Partner with a troubled personality: EU Treaty making in matters of CFSP and JHA after Amsterdam' (1998) 3 E.F.A.Rev. 177; Ramses Wessel, 'The Inside looking out: Consistency and Delimitation in EU External Relations' (2000) 37 CML Rev. 1135. See also JÖRG Monar 'The EU as an International Actor in the domain of Justice and Home Affairs' (2004) 9 E.F.A.Rev. 406

[29] Mitsilegas, n 1 ; See Valsamis Mitsilegas, *EU Criminal Law (*Oxford: Hart Publishing 2009).

[30] Steve Peers, *Justice and Home Affairs Law* (OUP 2011) 751

[31] Handbook on the practical application of the EU-US Mutual Legal Assistance and Extradition Agreements Council doc. 8024/11 (25 March 2011), which is an official non-binding document, drafted by the EU Presidency and the US Delegation in 2011.

[32] Ibid.

[33] Ibid, 7.

[34] Christian Kaunert, 'The External Dimension of EU Counter-terrorism Relations: Competences, Interests and Institutions' (2009) 22 Terrorism & Political Violence 41, 56.

[35] Summary of Conclusions of the EU-US JHA Ministerial Meeting (18 November 2013) Council doc. 16682/13.

(by both and EU and US) in recent times.[36] The 2011 Official Handbook on the application of the Agreements emphasises the existence of established practice and the evolving nature of EU-US rule-making.[37] Article 21 of the EU-US Extradition Agreement and Article 17 of the Mutual Legal Assistance Agreement stipulate that the Contracting parties will review their application no later than 5 years after their entry into force. In this review process, notably practical arrangements are to be considered as well as the evolving nature of the EU *itself*. The EU has expressed its eagerness to review the agreements in late 2013. Notably, the non-binding official Handbook on the agreements expresses the agreements to form possibly the basis of an institutional relationship between the EU and US on security. This demonstrates the far-reaching ambitious of transatlantic security cooperation. The Agreements themselves (Article 18 Extradition Agreement; Article 14 MLA Agreement) expressly permit the negotiation of new bilateral treaties which are consistent with the respective EU-US Agreements.

The account next sets out key provisions of the EU-US Extradition Agreements, followed by an outline of the place of the death penalty within the EU-US Extradition Agreement.

Overview of the EU-US Extradition Agreement

The EU-US Extradition Agreement was the centrepiece of the first-EU-US Summit held since the Iraqi war, in the aftermath of failed US attempts to extradite an accused flight instructor of the 9/11 hijackers on the grounds of proof of the US claim. The Extradition Agreement is viewed as having significantly widened the list of extradition offences (in Article 4 thereof)[38] and introduced provisions *inter alia* simplifying the transmission of documents (Article 7), furnishing additional information (Article 8), the temporary surrender of persons already in custody (Article 9), competing requests for extradition (Article 10), simplifying procedures where the fugitive consented to extradition (Article 11), the treatment of sensitive information (Article 14), the transit of fugitives and the exclusion of death penalty fugitives (Article 13). As outlined above, Article 3(2) of the Agreement provides that each Member State must acknowledge the Agreement in their bilateral agreement with the US. This resulted in various Member States altering their agreements. The reasons are far from cosmetic, because of, for example, the role provided for Interpol in the EU-US Agreement on provisional arrest in Article 6. The definition of an extraditable offence in Article 4 is credited with modernising the definition thereof by applying a dual criminality analysis. Where there is already a dual-criminality approach in the existing bilateral extradition treaty with a Member State, the EU-US Agreement's provisions do not apply, given that it is perceived as preferable to continue to apply existing and well-functioning provisions.[39]

The specific place of the death penalty in EU-US Extradition law is next considered.

EU-US Death Penalty Cooperation and Extradition

[36] Ibid.
[37] See Handbook (n 31) .
[38] See Peers (n 30).
[39] See Handbook (n 31).

There is a long-standing opposition by the EU to capital punishment[40] and all EU Member States are party to the ECHR Protocol 13 on the abolition of the death penalty. Moreover, Article 2 of the Charter of Fundamental Rights prohibits the death penalty in any circumstances. During the negotiation of the EU-US Extradition and Mutual Assistance Agreements, the death penalty proved a specific challenge for negotiations so as to accommodate the EU prohibition on the death within its legal mores. The US had sought a clause in the Extradition agreement guaranteeing the extradition of any EU national. As a result, the Agreement contains a clause permitting the requested State to make non-application of the death penalty a condition of extradition in Article 13.[41] An evaluation of existing practice in 2011 by the EU and US in their joint Handbook indicates that the language in Article 13 *precisely* reflects practice, which is that the US as a general rule agrees to the condition that the death penalty is not imposed, although one must discern conditionality to such an assessment.

Notably, the EU has made many *amicus curiae* advocacy submissions before the US Supreme Court in death penalty cases, even those with no application to the EU.[42] This is 'traceable' perhaps to the fact that the EU delegation in Washington DC has a specific official charged with furthering the EU's campaign against the death penalty for over a decade at the time of writing- thus preceding and postdating the Treaty of Lisbon with its innovations in legal personality and fundamental rights[43] and they have been centrally involved in this advocacy. This advocacy has been somewhat successful- i.e. within US Supreme Court jurisprudence:– and shows the reach of specific action *beyond* formal transatlantic cooperation through law.[44]

The chapter next considers the provisions of the EU-US Mutual Legal Assistance Agreement.

EU-US Mutual Legal Assistance Agreement

Overview

The EU-US Mutual Legal Assistance (MLA) Agreement has its origins in several provisions in the EU Mutual Assistance Convention of 2000 and its Protocol of 2001.[45] The MLA Agreement is designed as an assistance mechanism between law enforcement authorities and does not confer rights on

[40] 'EU Demarches on the issue of the death penalty- Declaration', in Conclusions of the General Affairs Council, 29 June 1998; EU Guidelines on the Death Penalty, Council doc. 10015/08, 5 June 2008 ; now Article 19(2) Charter of Fundamental Rights. See also Marise Cremona, 'Values in EU Foreign Policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders Policy interconnections between the EU and the rest of the world* (Oxford: Hart Publishing 2011) 275.

[41] Agreement on Extradition between the United States and EU [2003] OJ L 181/27, Article 13.

[42] See *McCarver v. North Carolina* 533 US 975 (2001); *Atkins v. Virginia* 536 US 304 (2002); *Roper v. Simmons* 534 US 551 (2005); *Medellin v. State of Texas* 552 US 491 (2008). See the account given Cremona n 40. See Fahey, 'On The Use Of Law in Transatlantic Relations: Legal Dialogues Between the EU and US' (n 1).

[43] Notes of interviews on file with the author.

[44] *Atkins v. Virginia* 536 US 304 (2002). Justice Stevens speaks of the views of the 'world community' in condemning the execution of the mentally retarded: at 317, n. 21. However, see *Medellin v. State of Texas* 552 US 491 (2008), where the EU unsuccessfully made submissions in proceedings concerning the constitutional impropriety of an Executive Order instructing State courts to implement a judgment of the International Court of Justice. On the perceived impact of differences in approach to extradition as a result, see V Nanda 'Bases for refusing International extradition requests- Capital punishment and Torture' (2000) 63 Fordham Int'l L.J. Journal 1369

[45] See Eileen Denza 'The 2000 Convention on Mutual Assistance in Criminal Matters' (2003) 40 CML Rev. 1073.

private parties e.g. defendants, because of the perceived inability of authorities to cope with the volume of possible requests across the Atlantic, but also the predominantly adversarial system of justice in the US. The MLA Agreement created what the 2011 Handbook refers to as a 'treaty-based, albeit partial' mutual legal assistance relationship between the US and 7 Member States (Bulgaria, Denmark, Finland, Malta, Portugal, Slovakia and Slovenia).

The EU-US Mutual Legal Assistance Agreement amended bilateral treaties where it existed as regards the supply of banking information (Article 4), joint investigative teams (Article 5), video conferencing of witnesses/ experts (Article 6), expedited transmission of requests (Article 7), the extension of mutual assistance rules to administrative authorities (Article 8), the protection of personal data (Article 9) and request confidentiality provisions (Article 19). Article 4 in particular was significant for placing the parties under an obligation to search for the existence of bank accounts and financial transactions unrelated to specific bank accounts and also including provisions on banking secrecy. Member States have designated their central authorities to process these requests, whilst the US has designated three federal law enforcement agencies (FBI, DEA and ICE)[46] to process the requests. It was significant for including within its scope evidence sharing for criminal investigations and prosecutions, streamlining of extradition arrangements, central points of contact between US and EU judicial authorities and the sharing of sensitive data, such as related to bank accounts and terrorist financing. While it was endorsed, for example, by the European Parliament Civil Liberties Committee in 2003, it was simultaneously criticised its provisions on fundamental rights grounds.[47] Nonetheless it receives considerably less attention from such quarters in recent times, where the spotlight lies upon data transfer agreements.

The chapter next outlines key features of the high profile agency-level cooperation between the EU and US, pursuant to the EU-US Europol Agreements.

3. EU-US Europol Agreements

Overview

Europol was established by an International Convention in 1995 and became an EU Agency in 2009. Its further reform is envisaged in Article 88 Treaty on the Functioning of the European Union (TFEU) and at the time of writing a draft Regulation on its reform is under consideration.[48] It has been accorded powers of international cooperation furthered through legal personality and it plays a distinctive role in various transatlantic security agreements with third countries, a broader discussion of which is not entered into here.[49] A Draft Regulation published in 2013 envisages similar

[46] Eg Federal Bureau of Investigation, Drug Enforcement Agency and Immigration and Customs Enforcement
[47] See the account in Mitsilegas, 2003 (n 1) .
[48]See Draft Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM(2013) 173 final. See also Christian Kaunert ' Europol and EU Counterterrorism: International Security Actorness in the External Dimension' (2010) 33 Studies in Conflict and Terrorism 652; 'European and FBI discuss cooperation countering international orgnaised crime and terrorism' (31 January 2014), see <https://www.europol.europa.eu/latest_news/europol-and-fbi-discuss-cooperation-countering-international-organised-crime-and-terrorism>. On its role in the EU-US TFTP Agreement, see Fahey, 'Law and Governance as checks and balances in Transatlantic Security' (n 1).
[49] See Nikolaos Lavranos 'Europol and the Fight Against Terrorism' (2003) 8 E.F.A.Rev. 269

powers to establish and maintain international cooperation agreements.[50] In 2001 and 2002, two US-Europol agreements were concluded, with some urgency despite their effects upon personal data, so as to allow US law enforcement authorities and Europol to share both strategic and personal information including criminal records.[51] The first agreement concerned the exchange of strategic and technical formation as to overall 'serious forms of international crime'. It included within its remit 'crimes committed or likely to be committed in the course of criminal activities', pursuant to Article 3 thereof. The Agreement identified points of contact, information exchange, mutual consultation, exchange of expertise and the exchange of liaison officers. The second agreement, the supplemental agreement on the exchange of personal data and related information, took longer to negotiate on the basis of civil liberties concerns. It is noted for including a significant number of data protection safeguards not previously conceded by the US, including for example, 'purpose limitation', which bound US federal agencies provided with information under the Agreement in section 7 thereof.

These agreements raised concerns as to their broad scope of information exchange, even beyond the remit of Europol at the time, for example, by not specifying the nature of the offences referred to in Article 5 of the Agreement.[52] It further raised issues as to the use of the data by US local authorities, giving them great access than in the EU. Similarly, provisions as to the onwards transmission of data to third States without adequate delimitation raised critique, as did the vaguely worded nature of oversight of the implementation of the Agreement.[53] Article 9 thereof also contained a series of data protection safeguards, albeit that their adequacy was similarly questioned from the outset. Later in 2002, a Council Decision stipulated that each Member State had to communicate a range of intelligence information to Europol, including data identifying groups, acts under investigation and links with other relevant terrorist offences. As noted above, at the time of writing, significant revisions to Europol are ongoing in the legislative process, which reflect significant develops as regards its accountability and legitimacy. It forms part of a broader reform process for agencies in the Area of Freedom, Security and Justice. These developments remain actively under consideration in contemporary EU-US relations.[54]

Newer forms of bilateral cooperation arising from new administrations both in the EU and US offer an alternative perspective on Justice and Home Affairs in transatlantic relations. They offer a specific

[50] See Article 64 of the Draft Regulation (legal personality); Maintenance and establishment of international cooperation (including with third countries, as defined therein) (Article 29); transmission of data thereto (Article 31).

[51] See the account of Mitsilegas, (n 1) 518. For the Agreements, which have enjoyed a veritably 'elusive' legal text which lacks an Official Journal reference, see <https://www.europol.europa.eu/sites/default/files/flags/united_states_of_america.pdf> accessed 31 March 2014 and https://www.europol.europa.eu/sites/default/files/flags/supplemental_agreement_between_europol_and_the_usa_on_exchange_of_personal_data_and_related_information.pdf> accessed 31 March 2014. See its listing of its international / external cooperation agreements on its website: <https://www.europol.europa.eu/content/page/external-cooperation-31> accessed 31 March 2014.

[52] Ibid.

[53] See Lavranos (n 50) .

[54] I.e. envisaged in the Ministerial meeting (n 9). See also Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (OUP 2013) and Madalina Busuioc, Deirdre Curtin and Martijn Groenleer, 'Agency growth between autonomy and accountability: the European Police Office as a 'living institution' (2011) 18 J.E.P.P. 848

perspective on the nature and boundaries of bilateral cooperation. The chapter next considers ongoing developments in EU-US cybercrime and cybersecurity.

4. EU-US Cybercrime and Cybersecurity Cooperation

The latest transatlantic cooperation in JHA is in cybercrime and cybersecurity, in the form of the EU-US Working Group on Cybercrime and Cybersecurity group (WGCC), was established after the EU-US Summit in November 2010. [55] However, the origins of this cooperation date back a decade earlier to the Joint EC-US Task Force on Critical Infrastructure Protection.[56] Also around this time, the Council of Europe Cybercrime Convention was adopted, which now forms a central legal element of EU-US cooperation as well as internal EU rule-making in this field.[57] The EU-US cooperation goals are predominantly in four areas: the expansion of cyber incident management response capabilities jointly and globally, through a cooperation programme culminating in a joint-EU-US cyber-incident exercise by the end of 2011, to broadly engage the private sector using public-private partnerships, sharing good practices with industry and to launch a programme of joint awareness raising activities, to remove child pornography from the internet and to advance the international ratification of the Council of Europe Convention by the EU and Council of Europe Member States and to encourage non-European countries to become parties.

It seems apparent that the WGCC had first and foremost 'global' rule-making objectives. The WGCC Group mentions specific countries to be 'encouraged' to become parties to the Convention, countries within and outside the EU.[58] In late 2013, the US expressed its regrets in an EU-US JHA Ministerial meeting that five EU Member States still had not yet ratified the Convention. They further expressed regret that training had been subsidised by the EU to promote an alternative EU Convention.[59] In 2008, the European Commission suggested that the redrafting of the Convention had become unachievable and nonetheless promoted both international and EU ratification, as it now does with the US.[60] Another goal of the EU-US cooperation includes the endorsement of EU-US 'deliverables' in cybercrime by the Internet Corporation for Assigned Names and Numbers (ICANNs).[61] And further evidence of the nature of the 'global' objectives of the rule-making and

[55] Council of the European Union, EU-US Summit, Joint Statement 16726/10 Presse 315, 20 November 2010, p. 3; Presidency Conclusions of the Cybercrime Conference, Budapest Conclusions (13 April 2011); WGCC Concept Paper, Annex 1 . See Elaine Fahey 'The EU'S Cybercrime and Cyber Security Rule-Making: Mapping the Internal and External Dimensions of EU Security' (2014) EJRR.

[56] 'Creating a safer Information Society by improving the security of information infrastructures and combating computer related crime': COM(2000)890 final

[57] See *Cyber-security Strategy of the European Union: An Open, Safe and Secure Cyberspace* JOIN(2013)1final, Brussels, (7 February 2013). In the same period as the publication of the EU cyber-security strategy, the US President signed Executive orders providing for rules on cyber-security for the US, couched in a dense framework of administrative law which accords considerable discretion to officials of the Department of Homeland Security, contrasting significantly with EU rules emerging: Executive Order 13636, *Improving Critical Infrastructure cyber-security*, Federal Register 78, No. 33 (19 February 2013). See also *The 2013 Cyber-security Executive Order: Overview and Considerations for Change*, Congressional Research Service 7-5700 R42984 (1 March 2013).

[58] WGCC Concept Paper, 4 .

[59] Summary of Conclusions of the EU-US JHA Ministerial Meeting (18 November 2013) Council doc. 16682/13.

[60] COM(2010) 517 final, 2

[61] WGCC Concept paper, 3.

policy development is provided by the minutes of a 2011 meeting of EU-US Senior JHA Officials, where it was stated that the EU and US would work together in the UN to avoid dilution of the body of international law on cybercrime.[62]

This latest EU-US cooperation may be said to indicate new boundaries in the transatlantic relationship on account of their global rule-making ambitions, notwithstanding firstly, formal limitations on the conduct of the US as an actor outside of the Council of Europe and secondly, the continued unwillingness of certain EU Member States to cooperate in the bilateral rule-making despite the urgency of cyber regulation.[63] Unlike earlier bilateral rule-making, this newer rule-making appears to have joint-shared 'global' objectives. The goals of the WGCC suggest that they will lead eventually to the adoption of a global-like cyber policy or at the very least, global standard-setting, through their promotion of the primacy of external norms. Instead, this newer bilateral rule-making is distinctive because it does not seek to engage in mutual recognition in justice and home affairs but rather has 'larger' global-like legal goals.

Conclusion

Transatlantic cooperation in criminal law is the subject of a vibrant agenda. It is one that currently appears heavily influenced by internal developments within the EU itself. The effects of the NSA affair appear not yet apparent and instead transatlantic rule-making continues to operate within its own autonomous political dynamic. An examination of contemporary practice reveals much'sophistication' in the evolution of transatlantic criminal law cooperation. It appears perhaps even disproportionately extensive, relative to the many limitations of mutual recognition in justice. This chapter has described the evolution and status quo of many cooperation mechanisms in a variety of areas of justice and home affairs. They contrast with new mechanisms for cooperation with increasingly global rule-making goals. Nonetheless, concerns as to fundamental rights and data protection remain constants, at least from an EU perspective.

The development of Extradition and Mutual Legal Assistance in practice in particular suggests a high level of cooperation and settled practice. This appears to have facilitated newer forms of cooperation, for example, in cybercrime. The secrecy and shortcomings vis a vis fundamental rights of transatlantic cooperation in security generally remain points of concern, similar to all forms of transatlantic cooperation as novel and complex integration between legal orders.

[62] 'Summary of Conclusions of the EU-US JHA Informal Senior Officials Meeting of 25-26 July,' Council doc 13228/11, p. 3. As to other officials viewpoints with respect the global orientation of EU rule-making, see Cf 'Critical Information Infrastructure Protection- Achievements and next steps: towards global cyber-security,' COM (2011)163 final; "Parliament demands single EU voice on cyber-security" *EUObserver.com*, 13 June 2012

[63] See the ratification table at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG> accessed 31 March 2014.